Supreme Court, U. S.
FILED
NOV 14 1980
MICHAEL RODAK, JR., CLERK

No. 79-1213

In the Supreme Court of the United States

OCTOBER TERM, 1980

WAYNE MINNICK, ET AL., PETITIONERS

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

BRIAN K. LANDSBERG
JESSICA DUNSAY SILVER
VINCENT F. O'ROURKE, JR.
ANDRE M. DAVIS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

LEROY D. CLARK
General Counsel

LUTZ ALEXANDER PRAGER
PAUL E. MIRENGOFF
Attorneys
Equal Employment Opportunity Commission
Washington, D.C. 20506

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1213

WAYNE MINNICK, ET AL., PETITIONERS

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTIONS PRESENTED

1. Whether the decision of the California Court of Appeal is a final judgment or decree subject to review in this Court under 28 U.S.C. 1257(3).

2. Whether state courts have jurisdiction over actions brought under Title VII of the Civil Rights Act of 1964.

3. Whether the California Court of Appeal properly reversed the state trial court's injunction barring respondents from considering race, national origin,* or sex in their hiring and promotion decisions under any circumstances.

---

* In the interest of brevity, we will use the term "race" to include "national origin."

TABLE OF CONTENTS

	Page
Interest of Amici Curiae	1
Statement	1
Summary of argument	5
Argument:	
I. The writ of certiorari should be dismissed because the decision below is not a final judgment or decree reviewable under 28 U.S.C. 1257(3)	7
II. The question whether respondents' affirmative action program violates Title VII of the Civil Rights Act of 1964 is not properly presented because state courts do not have jurisdiction of actions under Title VII	11
III. The Court of Appeal properly reversed the trial court's injunction prohibiting respondents, under any circumstances, from taking race or sex into account in particular employment decisions	15
A. The Fourteenth Amendment does not prohibit a state agency from remedying the effects of its past discrimination by voluntarily adopting an affirmative action plan that permits race or sex to be considered as a factor in selecting employees for positions that reasonably appear to have been affected by such discrimination	16
B. The Court should not reach the operational needs justification	26
Conclusion	31

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 ..... 15, 21
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36..13, 14, 22
Bakke v. *Regents of the University of California*, 18 Cal. 3d 34 4

PREVIOUS PAGE WAS BLANK

Cases—Continued Page

Bateman v. *Arizona*, 429 U.S. 1302 10
Califano v. *Goldfarb*, 430 U.S. 199 17
Califano v. *Webster*, 430 U.S. 313 ..... 17, 25
California v. *Arizona*, 440 U.S. 59 11
California v. *Krivda*, 409 U.S. 33 10
Chandler v. *Roudebush*, 425 U.S. 840 21
Charles Dowd Box Co. v. *Courtney*, 368 U.S. 502.. 13
City of Rome v. *United States*, No. 78-1840 (Apr. 22, 1980) 19
Claflin v. *Houseman*, 93 U.S. 130 12
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469.... 8, 9
Cruz v. *Beto*, 405 U.S. 319 28
Dayton Bd. of Educ. v. *Brinkman*, 443 U.S. 406.. 16
Doremus v. *Board of Education*, 342 U.S. 429 10
Dothard v. *Rawlinson*, 433 U.S. 321 ..... 1, 21
East Texas Motor Freight System, Inc. v. *Rodriguez*, 431 U.S. 395 ..... 10, 15
England v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 14
Erlin v. *National Union Fire Ins. Co.*, 7 Cal. 2d 547 7
Fox v. *Eaton Corp.*, 615 F.2d 716, petition for cert. pending, No. 79-1856 11
Fullilove v. *Klutznick*, No. 78-1007 (July 2, 1980..4, 9, 19, 23, 24, 25
Furnco Construction Co. v. *Waters*, 438 U.S. 567.. 23
General Telephone Co. v. *EEOC*, No. 79-488 (May 12, 1980) 10, 13, 15
Gospel Army v. *Los Angeles*, 331 U.S. 543 ..... 7, 9
Green v. *County School Board*, 391 U.S. 430 16
Gunther v. *Iowa State Men's Reformatory*, 612 F.2d 1079, cert. denied, No. 79-1566 (May 27, 1980) 11
Hazelwood School District v. *United States*, 433 U.S. 299 ..... 20, 23, 30
Hills v. *Gautreaux*, 425 U.S. 284 16
Hirabayashi v. *United States*, 320 U.S. 81 29
Kahn v. *Shevin*, 416 U.S. 351 17
Katzenbach v. *Morgan*, 384 U.S. 641 ..... 19, 23
Korematsu v. *United States*, 323 U.S. 214 29
Lee v. *Washington*, 390 U.S. 333 28
Louisiana v. *United States*, 380 U.S. 145 16

Cases—Continued Page

Love v. *Pullman*, 404 U.S. 522 13
Martinez v. *California*, 444 U.S. 277 ..... 11, 12
McDaniel v. *Barresi*, 402 U.S. 39 16
Mercantile Nat'l Bank v. *Langdeau*, 371 U.S. 555.. 13
Mohasco Corp. v. *Silver*, No. 79-616 (June 23, 1980) 20
Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539 10
New York Gaslight Club, Inc. v. *Carey*, No. 79-192 (June 9, 1980) 13, 14
Occidental Life Ins. Co. v. *EEOC*, 432 U.S. 355.... 13
People v. *Shuey*, 13 Cal. 3d 835, 120 Cal. Rptr. 83.. 7
Peterson v. *Eastern Airlines*, 20 Fair Empl. Prac. Cas. 1322 15
Philadelphia Newspaper, Inc. v. *Jerome*, 434 U.S. 241 10
Regents of the University of California v. *Bakke*, 438 U.S. 265 .....3, 4, 10, 15, 16, 19, 21, 22, 23, 26
Salaman v. *Bolt*, 74 Cal. App. 3d 907, 141 Cal. Rptr. 841 7
Schlesinger v. *Ballard*, 419 U.S. 498 17
Sinicropi v. *Nassau City*, 601 F.2d 60, cert. denied, 444 U.S. 983 14
Steelworkers v. *Weber*, 443 U.S. 193 ..... 6, 21
Stromer v. *Browning*, 268 Cal. App. 2d 513, 74 Cal. Rptr. 155 7
Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 16
Teamsters v. *United States*, 431 U.S. 324 ..... 20, 24
Testa v. *Katt*, 330 U.S. 386 12
United Jewish Organizations v. *Carey*, 430 U.S. 144 .....16, 19, 23
United States v. *City of Los Angeles*, 595 F.2d 1386 24
Village of Arlington Heights v. *Metropolitan Housing Corp.*, 429 U.S. 252 25

Constitution, statutes, rules and regulations:

United States Constitution, Fourteenth Amendment 1, 6, 8, 15, 16, 17, 22, 23
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.* .....*passim*

Constitution, statutes, rules and regulations—Continued

	Page
Section 705, 42 U.S.C. 2000e-4	1
Section 706, 42 U.S.C. 2000e-5	1, 5, 12
Section 706(b), 42 U.S.C. 2000e-5(b)	12
Section 706(f)(1), 42 U.S.C. 2000e-5(f)(1)	1, 12
Section 706(f)(2), 42 U.S.C. 2000e-5(f)(2)	12
Section 706(f)(3), 42 U.S.C. 2000e-5(f)(3)	12, 13
Section 706(f)(4), 42 U.S.C. 2000e-5(f)(4)	12
Section 706(f)(5), 42 U.S.C. 2000e-5(f)(5)	12
Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3701 *et seq.*	1, 23
Pub. L. No. 92-261, Section 2, 86 Stat. 103	17
28 U.S.C. 1257	8
28 U.S.C. 1257(3)	5, 7, 10
28 U.S.C. 1291	12
28 U.S.C. 1292	12
Fed. R. Civ. P.:	
Rule 53	12
Rule 65	12
28 C.F.R.:	
Section 42.203(i)	23
Section 42.301 *et seq.*	2
Section 42.306(b) and (c) (1976)	29
Section 50.14	23
29 C.F.R.:	
Section 1601.25(b)(a) (1971)	15
Section 1601.25(c)(a) (1973)	15
Section 1601.28 (1979)	15
Section 1608.1	23
Miscellaneous:	
110 Cong. Rec. 6548 (1964)	21
118 Cong. Rec. 1816 (1972)	18, 19, 20
119 Cong. Rec. 20070 (1973)	18

Miscellaneous—Continued

Page

122 Cong. Rec. (1976):

p. 33880 24
p. 34118 18

35 Fed. Reg. 10006 (1970) 15
37 Fed. Reg. 9219 (1972) 15
41 Fed. Reg. 38814 (1976) 23
42 Fed. Reg. 55393 (1977) 15
44 Fed. Reg. 4422 (1979) 23
H.R. Conf. Rep. No. 94-1723, 94th Cong., 2d Sess. (1976) 30
H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971) .. 14, 17, 18, 20
M. Redish & S. Muench, *Adjudication of Federal Causes of Action in State Court*, 76 Mich. L. Rev. 311 (1976) 11
S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971) 14, 18, 19, 20
United States Commission on Civil Rights, *For All the People—By All the People—A Report on Equal Employment Opportunity in State and Local Government Employment* (1969) 20

INTEREST OF AMICI CURIAE

Petitioners challenge, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*, and the Fourteenth Amendment to the Constitution, an affirmative action program implemented by respondent California Department of Corrections. The Equal Employment Opportunity Commission has responsibility to administer, interpret, and enforce Title VII of the Civil Rights Act. 42 U.S.C. 2000e-4 and 5. The Attorney General has enforcement responsibility under Title VII when the employer is a government, governmental agency, or political subdivision. 42 U.S.C. 2000e-5(f)(1).

Moreover, respondent California Department of Corrections has received funds under the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. 3701 *et seq.*, which is administered by the Law Enforcement Assistance Administration (LEAA). The nondiscrimination provisions of that Act and implementing LEAA regulations are of some relevance in this case.

STATEMENT

Petitioners contend that respondents, acting pursuant to an Affirmative Action Program adopted in 1974 (Exh. G) and revised in 1975 (Exh. R), impermissibly discriminate on the basis of race and sex by giving preferences to women and minorities in hiring and promotions. The written Program says nothing about how, or even whether, race or sex may be taken into account in individual hiring or promotion decisions.[1] It describes other measures to be taken to fulfill the policy of equal employment opportunity —*e.g.*, undertaking aggressive recruiting measures directed to women and minorities (Exh. R at 15, 22-24);

[1] The Program, as revised in 1975, provides that each institution and parole region was to develop an affirmative action plan "directed toward actively seeking out minorities and women and encouraging job retention by creating a realistic climate for equal opportunity in the Department of Corrections. The plan must give priority *consideration* to minorities and women in all hiring and promotional practices" (Exh. R at 6; emphasis added). The Program does not, however, direct that any preference be given.

working with the State Personnel Board to ensure that qualifications are job-related (*id.* at 14, 24, 32); providing job-related training to all employees, with special focus on minorities and women (*id.* at 34-35); and training all employees in equal employment opportunity matters (*id.* at 36-38). Petitioners do not challenge these aspects of the Program (Pet. Br. 38; Pet. App. F-4) which, at all events, appear to be required by LEAA regulations. 28 C.F.R. 42.301 *et seq.* However, petitioners do contend that officials of the Department, *motivated* by the aims of the written Program, impermissibly give preference to women and minorities in individual hiring and promotion decisions.

At trial, officials of the Department testified that it is the Department's policy to hire and promote only the most qualified applicants (R.T. 194, 203-206, 333-334, 383, 452-453, 483, 487-488, 548, 563-564, 591, 666, 668, 672, 773, 777-778, 792, 882). However, the officials, in response to hypothetical questions about how that policy was to be implemented, testified that the fact that an applicant is a minority or woman is a consideration that would be taken into account, along with other factors, in determining applicants' qualifications for positions where there is an underrepresentation of women or minorities (R.T. 227-228, 284, 309, 372-374, 382-383, 453-454, 498-499, 600, 793). The effect was described to be that if competing applicants were reasonably equally qualified, the minority individual or woman would get the position (R.T. 289, 601). No fixed percentage of positions was reserved for women and minorities (Pet. App. A-7, A-16), nor was there an official policy of setting positions aside for them, except where female or male-only certifications were obtained because sex was a bona fide occupational qualification.[2]

[2] The Court of Appeal did note (Pet. App. A-7) that some positions were designated for one sex. Designations of positions by sex may, of course, be justified under Title VII and the Fourteenth Amendment where sex is a bona fide occupational qualification. *Dothard* v. *Rawlinson*, 433 U.S. 321, 332-337 & n.20 (1977). No assessment of the particular positions affected is available on the present record.

There were also certain instances in which positions were identified as being reserved for minorities. But, as respondents point out

The evidence did not show, and the state courts did not determine, what weight was given to race or sex in any particular instance when it actually was taken into account. Indeed, petitioners did not establish and the trial court did not find *any* specific occasion in which a lesser qualified minority or female applicant was selected over a more qualified white or male. Nor did the Court of Appeal identify any such specific instance. The Court of Appeal noted (Pet. App. A-6 to A-7) only that, although the qualifications of non-minorities and males "are still 'weighed fairly and competitively'" (Pet. App. A-16, quoting *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 317-318 (1978) (Powell, J.)), "[s]ome evidence supported the inference that this 'plus' [given to minorities and women] has occasionally contributed" to the promotion of a minority or woman ahead of a more qualified applicant. The court found no evidence, however, of any specific instance in which a preference was given in initial hiring (see also note 5, *infra*).[3] On this record, then, petitioners' challenge to respondents' employment practices is a challenge only to the Department's promotional practices on their face.[4]

(Resp. Br. 8), responsible Department officials testified that this was never the Department's policy and that when such incidents were brought to the attention of supervisors they were promptly corrected. Neither the trial court nor the Court of Appeal made any finding that those corrective measures were inadequate.

[3] Even with the Department's affirmative action efforts, non-minorities and males continued (in the period reflected in the record thus far) to receive a large portion of the promotions in the Department. In 1975, whites received 72% of the promotions to the higher ranking security positions, Correctional Program Supervisor II and III (Exh. D). In that year, males received 94% of the promotions to these positions (*ibid*). Whites received 70% of the Department-wide promotions in 1976 (R.T. 679).

[4] Thus, petitioners do not challenge an application of the policy to any particular employment decision—*e.g.*, on the ground that the factor of race or sex was given too much weight, that a female or

Respondents contend (Resp. Br. 26-28, 34-43) that this policy permitting preferences in particular cases furthers a compelling interest in remedying the effects of past discrimination by the Department. They also contend (*id.* at 28-33, 43-50) that the policy furthers the compelling state interest in promoting prison security and fostering inmate rehabilitation. The trial court made no finding whether either of these purposes was supported by the evidence. Indeed, the trial court viewed the purpose to be furthered by the plan—and whether past discrimination existed—to be irrelevant (Pet. App. A-22 to A-23; 5/5/77 Tr. 132; 4/14/77 Tr. 20; R.T. 344). It was the trial court's conclusion, apparently based on the California Supreme Court's decision in *Bakke* v. *Regents of the University of California*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), that respondents were prohibited from giving consideration to race, sex, or national origin in individual hiring and promotion decisions under *any* circumstances, and it enjoined them from doing so (Pet. App. D-2, F-4, G-2).

On appeal, the California Court of Appeal concluded that under this Court's decision in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), which was decided after the trial court's decision, the Fourteenth Amendment does not preclude consideration of race or sex where necessary to further a compelling state interest (Pet. App. A-14 to A-15). The Court of Appeal therefore reversed the Superior Court's injunction barring consideration of race or sex under any circumstances. Like the trial court, the Court of Appeal did not consider whether the Department's promotions policies could be supported as a means to remedy past discrimination by the Department; it left this issue open for consideration on remand (Pet. App. A-23). But the Court of Appeal

---

minority individual who was not qualified nevertheless was appointed, or that race or sex was taken into account in selecting employees for positions in which minorities or women were not underrepresented. Compare *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980), slip op. 28-29, 34-35 (opinion of Burger, C.J.). Indeed, the only individual petitioners in this case, Minnick and Darden, were found not to have been qualified for promotion to the positions they sought (Pet. App. A-9, A-23).

did conclude that those practices could be supported by California's compelling interest in the proper management of its correctional system (Pet. App. A-17). Even this issue, however, was left open for further examination on retrial. See point I, *infra*.

SUMMARY OF ARGUMENT

I.

A. The Court of Appeal's decision is not a final judgment or decree subject to review under 28 U.S.C. 1257(3). Under California law, an appellate decision reversing a trial court judgment remands the case for a new trial as if a judgment had never been entered, unless the appellate court indicates a contrary intention. Here, the Court of Appeal's decision plainly contemplates a retrial. This case does not fall into any exceptions to the final judgment rule, because the new trial will be on the very federal questions petitioners raise in this Court, and many factual issues bearing on these questions remain to be explored.

B. The Court of Appeal held that respondents' practices do not violate Title VII of the Civil Rights Act of 1964. In our view, however, jurisdiction of Title VII claims is exclusively in the federal courts. Section 706 of the Act provides that federal district courts "shall have jurisdiction" of such cases, and the structure of the Act is indicative of a legislative intent that this jurisdiction would be exclusive, as a supplement to available state remedies. The legislative history of Title VII and decisions of this Court reinforce this conclusion.

II.

If the Court reaches the merits, it should affirm the judgment of the California Court of Appeal, which reversed the trial court's injunction barring respondents from considering the race or sex of an applicant under *any* circumstances.

A. The Fourteenth Amendment does not bar a state agency from giving limited, class-based preferential treatment to qualified women or minorities in order to remedy the effects of its own prior discrimination. Indeed, the Con-

stitution *requires* consideration of race to remedy the present effects of past discrimination, and a state may do so even where there has been no judicial determination of past discrimination. When Congress extended Title VII to state and local governments in 1972, it found that racial discrimination by these entities has a particularly deleterious effect because it promotes ignorance of minority problems on the part of government officials and creates distrust of the government by minorities.

A state agency ordinarily is the appropriate authority to remedy its own past discrimination. It has access to all relevant information and has the expertise to identify and analyze its previous practices to determine if they were the result of discrimination, subtle or overt. A state agency's remedying of its own discrimination is also consistent with the policy reflected in Title VII of deferring to the states and localities in remedying employment discrimination. In fashioning an appropriate remedial program, the agency is not confined to identifying particular instances of discrimination and affording individualized relief on a case-by-case basis. In order to undo the impact on society at large of its employment discrimination, it is especially appropriate for a state agency to adopt measures designed to increase minority representation on the work force to the level that would have obtained in the absence of discrimination.

Moreover, Title VII is to serve as a catalyst to cause employers to self-evaluate their employment practices and to endeavor to eliminate discrimination. As we explained in our brief in *Steelworkers* v. *Weber*, 443 U.S. 193 (1979), if this self-evaluation discloses a sound basis on which it reasonably could be concluded that the employer has violated Title VII, it may voluntarily undertake measures to remedy that violation. A governmental agency should not be held to *violate* the Fourteenth Amendment if it reasonably and in good faith takes measures to comply with a statute enacted by Congress to *enforce* that Amendment.

B. Respondents' alternative justification for its employment practices—that they promote prison security and

inmate rehabilitation—creates a significant potential for involving the government in reinforcing racial stereotypes. It could be supported only by the most compelling circumstances, which have not been demonstrated on the record. The Court need not reach this question, however. The preferable course in a case such as this is first to determine what measures are appropriate to remedy prior discrimination, for which some class-based, race-conscious relief is permissible. Only then should the court consider what, if any, additional measures are justified by the employer's operational needs. The trial court may follow this course on remand.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED BECAUSE THE DECISION BELOW IS NOT A FINAL JUDGMENT OR DECREE REVIEWABLE UNDER 28 U.S.C. 1257(3)

Under California law, an appellate decision reversing a trial court judgment vacates the judgment and returns the case for a new trial "as if no judgment had ever been rendered." See *Salaman* v. *Bolt*, 74 Cal. App. 3d 907, 914, 141 Cal. Rptr. 841, 844 (1977), and cases cited. Because a reversal "places the parties in the same position as if the case had never been tried," the losing party in the appellate court is free on retrial to introduce additional evidence in support of its claims. See *Gospel Army* v. *Los Angeles*, 331 U.S. 543, 547 (1947), quoting *Erlin* v. *National Union Fire Ins. Co.*, 7 Cal. 2d 547, 549 (1936). The only exceptions to this rule are where the appellate court clearly does not intend a new trial, see, *e.g.*, *Stromer* v. *Browning*, 268 Cal. App. 2d 513, 518-519, 74 Cal. Rptr. 155, 158 (1968), or where the appellate court finally resolves a dispositive legal issue which does not turn upon facts which might change at a new trial. 268 Cal. App. 2d at 520; 74 Cal. Rptr. at 160; *People* v. *Shuey*, 13 Cal. 3d 835, 842, 533 P.2d 211, 216, 120 Cal. Rptr. 83, 88 (1975).

In the present case, the Court of Appeal plainly did not intend to foreclose a new trial or determine an issue in a manner that would be unaffected by the introduction

of new evidence. To the contrary, the court expressly observed that it need not consider the relevance of respondents' evidence of prior discrimination or the validity of another of the trial court's findings because both questions would be determined "[i]f the case is to be retried" (Pet. App. A-23). The Court of Appeal also observed that questions of jurisdiction and standing would "require examination if the case is to be retried" (Pet. App. A-24). In these circumstances, this Court's decision in *Gospel Army* v. *Los Angeles, supra,* compels the conclusion that the Court of Appeal's decision is not a final judgment or decree under 28 U.S.C. 1257.

The Court has carved out certain exceptions to the finality requirement where the highest court of a State "has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 477 (1975). But the exceptions to the finality rule discussed in *Cox* apply in situations in which the further proceedings in state court are on *nonfederal* issues. *Id.* at 477-487. Here, the further proceedings in state court would be on the very *federal* issues that petitioners seek to have reviewed by this Court—whether, and to what extent, the Department's practices are inconsistent with the Fourteenth Amendment and Title VII. The Court of Appeal hardly can be thought to have "finally determined" these federal questions when it has given petitioners the opportunity to retry them, subject to further appellate review in the state courts.

It is true that the Court of Appeal held, on the basis of the record before it, that the Department's practice of considering race or sex as one factor in assessing qualifications was not invalid on its face, in view of what is perceived to be the Department's compelling interest in the proper management of the correctional system. This ruling on the legal principle will govern further proceedings in the trial court, but will remain subject to review by this Court after a final judgment is rendered by the state courts. And the parties will be free on retrial to introduce additional evidence.

Moreover, the principal question in this case is whether petitioners are entitled to *injunctive* relief (Pet. App. A-9 & n.4, G). The trial took place more than four years ago, and concerned incidents that occurred early in the Program's implementation. The new trial contemplated by the Court of Appeal presumably would be concerned with whether petitioners are *now* entitled to injunctive relief, in light of experience under the Program, changed circumstances, and intervening developments in the law, including the decisions in *Bakke* and *Weber*, *supra*, and *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980). For example, respondents' new Affirmative Action Program, adopted in 1979, could be taken into account, and the passage of time may have resulted in substantial changes in the composition of the work force and the Department's security requirements, affecting the Department's purported need to consider race or sex for operational purposes. Accordingly, even as to the asserted operational needs justification, "[w]e cannot assume that the [Court of Appeal] would hold the [practices] in question constitutional no matter what facts might be presented upon a second trial. Indeed, experience demonstrates that particularly in constitutional cases issues turn upon factual presentation." *Gospel Army* v. *Los Angeles*, *supra*, 331 U.S. at 548.

Finally, the Court of Appeal left open for consideration on remand whether respondents' practices are justified to remedy past discrimination by the Department; accordingly the decision of the Court of Appeal plainly is not final on that question. Because the prior discrimination issue remains unresolved, the decision of the Court of Appeal on the operational needs issue does not fall into the exceptions to the final judgment rule discussed in *Cox Broadcasting Corp.* v. *Cohn*, *supra*, for the additional reason that further proceedings in the trial court would "require the decision of other federal questions [*i.e.*, the prior discrimination issue] that might also require review by the Court at a later date * * *." 420 U.S. at 477.

Because the decision below is not a final judgment or decree, the Court is without jurisdiction to review the case at this time. Therefore, the writ of certiorari should

be dismissed. Even if the Court were to conclude that it has jurisdiction under 28 U.S.C. 1257(3), the Court may wish to consider dismissing the writ as improvidently granted because of a number of other features of the case, set forth in the margin, that may not have been apparent when the petition for a writ of certiorari was granted.[5]

---

[5] (1) If the Court were to find the decision below "final", it could only be in the sense that the Court of Appeal finally rejected the trial court's holding that the state's consideration of race, sex, or national origin would be impermissible under *any* circumstances. That narrow question does not warrant review at this time in light of this Court's decision in *Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 272.

(2) The Court of Appeal perceived problems with petitioners' standing and the state court's jurisdiction that it concluded would "require examination if the case is to be retried" (Pet. App. A-23 to A-24). If it should turn out that the state court does not have jurisdiction or petitioners do not have standing under state law, this may be an adequate independent state ground supporting the judgment of the Court of Appeal. *Philadelphia Newspaper, Inc.* v. *Jerome,* 434 U.S. 241 (1978); *California* v. *Krivda,* 409 U.S. 33 (1972). Further review of petitioners' standing under state law might also shed some light on whether petitioners have properly invoked this Court's Article III jurisdiction, in view of their failure to establish injury to any specific individual employee and uncertainty respecting the likelihood of future injury. See *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539-546 (1976); *Doremus* v. *Board of Education,* 342 U.S. 429, 434 (1952); *Bateman* v. *Arizona,* 429 U.S. 1302, 1305 (1976) (Rehnquist, J.).

(3) The Court of Appeal reversed the trial court's apparent finding (Pet. App. F-4, F-7, E-2) that the Department granted preferences to minorities and women in its *hiring* practices, holding (Pet. App. A-7 to A-8) that "[t]here was no substantial evidence of any instance in which [such preference] had been exercised in the 'initial hiring' of a new employee." See also Pet. App. A-17. Moreover, although petitioners Darden and Minnick (but not CCOA) sought to represent a class that would have included applicants for employment (First Amended Complaint, at 2), the Superior Court declined to certify the case as a class action (Pet. App. A-23). As a result, claims of discrimination in initial hiring are not properly before the Court. Cf. *General Telephone Co.* v. *EEOC,* No. 79-488 (May 12, 1980), slip op. 12; *East Texas Motor Freight* v. *Rodriguez,* 431 U.S. 395, 403 (1977). Questions 1, 2 and 3 presented by petitioners (Pet. Br. i) must therefore be limited to *promotions.* For similar reasons, Questions 4 and 5 (*ibid.*), which challenge the validity of the five-year goals for employment of minorities and

II. THE QUESTION WHETHER RESPONDENTS' AFFIRMATIVE ACTION PROGRAM VIOLATES TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 IS NOT PROPERLY PRESENTED BECAUSE STATE COURTS DO NOT HAVE JURISDICTION OF ACTIONS UNDER TITLE VII

The Superior Court held (Pet. App. E-2, F-7) that respondents' employment practices violated Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*). The Court of Appeal reversed that portion of the judgment, finding no violation of Title VII (Pet. App. B-2). In our view, however, federal court jurisdiction of Title VII cases is exclusive [6] and the California courts were therefore without jurisdiction to entertain petitioners' Title VII claims.

Ordinarily state courts may enforce rights created by federal law. Indeed, this Court has indicated that concurrent jurisdiction "might be presumed" unless Congress provides to the contrary. See *California* v. *Arizona*, 440 U.S. 59, 66-68 (1979). See generally M. Redish & S. Muench, *Adjudication of Federal Causes of Action in State Court*, 76 Mich. L. Rev. 311, 313-325 (1976). Thus, as this Court recently stated in *Martinez* v. *California*, 444 U.S. 277 (1980), with respect to 42 U.S.C. 1983, "[where] 'an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a

---

women, are not properly presented for review. The Court of Appeal, after reviewing the Affirmative Action Program, concluded (Pet. App. A-6) that these goals were "directed to the hiring of new female and minority employees," not promotion of existing employees.

[6] Two courts of appeals have declined to reach the question where it arose tangentially. *Fox* v. *Eaton Corp.*, 615 F.2d 716, 719 n.7 (6th Cir. 1980), petition for cert. pending, No. 79-1856; *Gunther* v. *Iowa State Men's Reformatory*, 612 F.2d 1079, 1083-1084 & nn.4, 5 (8th Cir.), cert. denied, No. 79-1566 (May 27, 1980). The few federal district courts and state courts that have considered the question are divided. See cases cited in *Fox* v. *Eaton Corp.*, *supra*, 615 F.2d at 719; see also *Peterson* v. *Eastern Airlines*, 20 Fair Empl. Prac. Cas. 1322 (W.D. Tex. 1979) (finding concurrent jurisdiction).

State court.' " 444 U.S. at 283 n.7, quoting *Testa* v. *Katt*, 330 U.S. 386, 391 (1947), and *Claflin* v. *Houseman*, 93 U.S. 130, 137 (1876).

In the case of Title VII, however, Congress *has*, in considerable detail, "specif[ied] a remedy for its enforcement." Section 706, 42 U.S.C. 2000e-5. The person aggrieved first must file a charge with a federal administrative agency, the EEOC. Section 706(b). If the EEOC cannot resolve the controversy through conciliation, the person aggrieved, the EEOC, or the Attorney General may bring a civil action. Section 706(f)(1). Section 706(f)(3) then provides that each United States district court "shall have jurisdiction" of actions brought under Title VII. Although the language of subsection (f)(3) does not, in so many words, provide that this jurisdiction is exclusive, Congress' intent that it be so appears from the numerous provisions in Section 706 that assume that the action will be brought in federal court. For example, Section 706(f)(4) provides for the chief judge of the district or the circuit to ensure expedited consideration of the case, and Section 706(f)(5) provides for appointment of a master under Fed. R. Civ. P. 53. Section 706(f)(2) states that the granting of temporary or preliminary relief shall be governed by Fed. R. Civ. P. 65. And, finally, Subsection (j) provides that "[a]ny civil action" brought under Section 706 "shall be subject to appeal" as provided in 28 U.S.C. 1291 and 1292, which govern appeals in federal courts. These provisions are inconsistent with the notion that Title VII cases can be brought in state court.

Nor was Congress silent regarding the role of the states in guaranteeing equal employment opportunity. Section 706(b) provides that where state or local law prohibits the alleged discriminatory practices and permits a state or local authority to grant or seek relief, no charge may be filed with the EEOC for 60 days after proceedings were "commenced under the State or local law." Congress' express provision for state agencies and courts to play a role in securing fair employment practices only "under * * * State or local law" suggests that they have no role in enforcing the parallel federal law, Title VII. Thus, as the Court stated

last Term in *New York Gaslight Club, Inc.* v. *Carey*, No. 79-192 (June 9, 1980) (slip op. 10; emphasis added), "[i]t is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in *federal court* as supplements to available *state* remedies for employment discrimination." Indeed, this Court has often assumed, apparently without deciding, that it is the federal courts that have enforcement authority under Title VII. See *id.* at 9, 11 & n.6, 12; *General Telephone Co.* v. *EEOC*, No. 79-488 (May 12, 1980), slip op. 13; *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 360, 361, 364, 366, 367, 368, 370 (1977); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974); *Love* v. *Pullman Co.*, 404 U.S. 522, 523 (1972).[7]

As amicus AFL-CIO points out (Br. 13-16), the legislative history of the Civil Rights Act of 1964 and the

---

[7] This case differs substantially from *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962), in which the Court held that Section 301(a) of the Labor Management Relations Act, which provides that federal district courts "may" hear suits for violation of collective bargaining agreements, did not *divest* state courts of their *preexisting* authority to entertain suits for breach of contracts. Here, Section 706(f)(3) provides that district courts "shall" have jurisdiction, not that suits "may" be brought there (*Dowd Box Co.* v. *Courtney*, *supra*, 368 U.S. at 506; compare *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 559 (1963)).

Moreover, in *Dowd Box*, the Court emphasized that state courts had traditionally exercised jurisdiction over breach of contract actions (368 U.S. at 508); that the legislative history demonstrated that Congress merely intended to expand the availability of forums in which such actions could be brought (*id.* at 508-514); that Congress had rejected proposals to invoke a federal administrative process to resolve such disputes (*id.* at 513); and that the federal law to be applied would often adopt state law (*id.* at 506-507). In contrast, exclusive federal jurisdiction under Title VII would not *divest* state courts of preexisting jurisdiction over employment discrimination claims; remedies under state law, to the extent they exist, are expressly preserved. Congress created in Title VII a new and distinct federal right (not within the traditional scope of state court jurisdiction) and provided for its enforcement by a federal administrative agency. There is also no occasion under Title VII to adopt as the rule of decision provisions of state law with which state courts might be more familiar.

1972 amendments to Title VII also confirm that civil actions would be brought in federal court. For example, the House report on the 1972 amendments states that the person aggrieved "shall * * * have the right to commence an action * * * in the proper United States district court." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 12 (1971); see also S. Rep. No. 92-415, 92d Cong., 1st Sess. 23 (1971) ("in the appropriate U.S. district court").

State court jurisdiction to enforce Title VII would also create a significant potential for frustrating Title VII's purpose of encouraging resolution of discrimination complaints through resort to state proceedings and conciliation by the EEOC. While the application of the common law rules of preclusion to Title VII claims is not clear (compare *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 49 n.10, with *Sinicropi* v. *Nassau County*, 601 F.2d 60 (2d Cir.), cert. denied, 444 U.S. 983 (1979)), if the person aggrieved could have, but did not, join his Title VII claim with his state law claim in state court, he might be barred by principles of res judicata from later bringing a Title VII action in federal court. This possibility might deter full pursuit of remedies under state law. See *New York Gaslight Club, Inc.* v. *Carey*, *supra*, slip op. 11 n.6. Moreover, in order to preserve his right to a federal forum, a person whose federal charge is still pending before the EEOC when he seeks relief in state court might feel constrained to short-circuit EEOC conciliation efforts and file a protective action in federal district court in order to prevent the res judicata bar. Cf. *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).[8]

---

[8] Since Title VII was enacted in 1964, the approximately 100 federal district courts have developed considerable expertise in handling the complex facts, sensitive legal and equitable issues, and technical procedural problems that frequently arise in these cases. When trial of these cases is confined to the federal district courts, as it has been to date, the federal courts of appeals are available to apply their considerable expertise and thereby to perform an essential screening function for this Court. In many cases, resolution of the issues presented requires reliance on substantive Title VII law, federal rules of procedure, and the exercise of the Court's

For these reasons, we submit that, while the question is not without difficulty, the California courts were without jurisdiction to consider petitioners' Title VII claims.[9] Accordingly, if the writ of certiorari is not dismissed, the portion of the Court of Appeal's judgment pertaining to Title VII should be vacated with instructions to dismiss the complaint in pertinent part.

III. THE COURT OF APPEAL PROPERLY REVERSED THE TRIAL COURT'S INJUNCTION PROHIBITING RESPONDENTS, UNDER ANY CIRCUMSTANCES, FROM TAKING RACE OR SEX INTO ACCOUNT IN PARTICULAR EMPLOYMENT DECISIONS

We agree with the Court of Appeal that, under this Court's decision in *Bakke*, the Fourteenth Amendment does not bar a public entity from taking race or sex into account under *all* circumstances. 438 U.S. at 272. As we explain below, a state agency may institute programs that utilize such classifications where the program is tailored in purpose and effect to remedy prior discrimination. Respondents have sought to defend the employment practices chal-

---

supervisory power. See, *e.g.*, *General Telephone Co.* v. *EEOC*, *supra*, slip op. 10-12; *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 403-406 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-425 & n.14 (1975). Resort to some of these sources of guidance may be foreclosed in review of cases coming from state courts.

[9] Early versions of the EEOC's regulations pertaining to right-to-sue letters stated that the person aggrieved would be notified of his "right to sue in a Federal District Court." See 29 C.F.R. 1601.25b(a) (1971), as added, 35 Fed. Reg. 10006 (1970); 29 C.F.R. 1601.25c(a) (1973), as added, 37 Fed. Reg. 9219 (1972). Presumably for this reason, the right-to-sue letters issued to petitioners Minnick and Darden in this case informed them of their right to sue "in the appropriate United States District Court" (Exhs. 39, 40). The reference to federal district court was deleted when EEOC's regulations were revised in 1977. See 29 C.F.R. 1601.28 (1979), as added, 42 Fed. Reg. 55393 (1977). See also *Peterson* v. *Eastern Airlines*, 20 Fair Empl. Prac. Cas. 1322 (W.D. Tex. 1979) (EEOC, as amicus curiae, urges concurrent jurisdiction). On reexamination, however, we believe that the interpretation suggested in the earlier EEOC regulations is correct.

lenged here on the ground that they are necessary to remedy the effects of past discrimination, and this question remains open for consideration on remand to the trial court. Therefore, if the Court reaches the merits, the judgment of the Court of Appeal, which reversed the trial court's injunction prohibiting consideration of a candidate's race or sex under any circumstances and remanded for a new trial, should be affirmed.

A. The Fourteenth Amendment Does Not Prohibit A State Agency From Remedying The Effects Of Its Past Discrimination By Voluntarily Adopting An Affirmative Action Plan That Permits Race Or Sex To Be Considered As A Factor In Selecting Employees For Positions That Reasonably Appear To Have Been Affected By Such Discrimination

This Court has recognized that remedying racial discrimination and preventing its effects from being carried forward serves such an important public purpose that a public entity may utilize racial classifications to achieve that end. See *Fullilove* v. *Klutznick, supra*; *Regents of the University of California* v. *Bakke, supra*, 438 U.S. at 307 (Powell, J.); *id.* at 325, (Brennan, Marshall, White, and Blackmun, JJ.). Indeed, when a state entity has engaged in discrimination, the Constitution requires the consideration of race where necessary to eliminate the present effects of that discrimination. See *Green* v. *County School Board*, 391 U.S. 430 (1968). This duty arises wherever discrimination has been practiced—in public schools, *e.g.*, *ibid.*; *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526 (1979); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); in voting, *e.g.*, *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965); and in housing, *e.g.*, *Hills* v. *Gautreaux*, 425 U.S. 284, 297 (1976). A public entity which has discriminated in the past, or which is likely to be found to have so discriminated, may voluntarily take race-conscious measures to remedy the effects of its practices without violating the Fourteenth Amendment —even where there has been no finding of a constitutional violation by a court. See *McDaniel* v. *Barresi*, 402 U.S. 39 (1971) (upholding a voluntary desegregation plan); *United Jewish Organizations* v. *Carey*, 430 U.S. 144

(1977). The same principles apply, in our view, where a state agency's employment practices have discriminated on the basis of race.[10]

Although the validity of respondents' practices under Title VII are not before the Court (see pages 11-15, *supra*), the statutory provisions in Title VII and the legislative background and purposes of its extension to state and local governments in the exercise of Congress' power to enforce the Fourteenth Amendment reinforce the conclusion that would have been reached as to the constitutional questions before the extension of Title VII. In our view, the Fourteenth Amendment does not prohibit a public employer from taking remedial measures that are consistent with this legislative background and purpose and are designed to ensure compliance with Title VII.

The importance of eliminating racial discrimination in state and local government employment was underscored by Congress when it extended Title VII to those governments in 1972. Pub. L. No. 92-261, Section 2, 86 Stat. 103. Congress found that "widespread discrimination against minorities exists in State and local government employment," and that this discrimination "is perpetuated by the presence of both institutional and overt discriminatory practices [, *e.g.*,] * * * through *de facto* segregated job ladders, invalid selection techniques, and stereotyped misconceptions by supervisors regarding minority group capabilities." H.R. Rep. No. 92-238, *supra*, at 17. Indeed, em-

---

[10] Petitioners challenge respondents' promotions policy principally on the ground that it is based on impermissible *racial* classifications (Pet. Br. 21-32, 36, 38-40), although they also take issue with gender-based classifications (*e.g.*, Pet. Br. 33, 37-38, 40, 44-46). In our view, a state agency has at least as much flexibility to remedy discrimination on the basis of sex as it does where race is concerned. This Court has recognized that equal protection principles permit the use of gender-based classifications to remedy the " 'long-standing disparate treatment of women.' " *Califano* v. *Webster*, 430 U.S. 313, 317 (1977), quoting *Califano* v. *Goldfarb*, 430 U.S. 199, 209 n.8 (1977). Where governmental practices have operated to limit employment opportunities for women, governmental programs designed to remedy these limitations serve constitutionally permissible objectives. See *Califano* v. *Webster*, *supra*; *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Kahn* v. *Shevin*, 416 U.S. 351 (1974).

ployment discrimination by state and local government was found to be even "more pervasive than in the private sector" (*ibid.*). See also S. Rep. No. 92-415, *supra*, at 10; 118 Cong. Rec. 1816 (1972) (remarks of Sen. Williams).

Congress also recognized that the harm resulting from discrimination in government employment extends well beyond the loss of employment opportunities to individuals:

> This failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. The importance of equal opportunity in these agencies is, therefore, self-evident. In our democratic society, participatory government is a cornerstone of good government. Discrimination by government therefore serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government.

S. Rep. No. 92-415, *supra*, at 10; see also H.R. Rep. No. 92-238, *supra*, at 19; 118 Cong. Rec. 1816 (1972) (remarks of Sen. Williams). Congress found that employment discrimination was "particularly acute" and had "the most deleterious effect in [those] governmental activities which are most visible to the minority communities (notably education, *law enforcement, and the administration of justice*) with the result that the credibility of the government's claim to represent all the people equally is negated." H.R. Rep. No. 92-238, *supra*, at 17 (emphasis added).[11] Accord-

---

[11] Similar concerns about the effect on minority communities of employment discrimination in law enforcement agencies were voiced when the non-discrimination provisions of the Omnibus Crime Control and Safe Streets Act were amended in 1973 and 1976. 119 Cong. Rec. 20070 (1973) (remarks of Rep. Jordan); 122 Cong. Rec. 34118 (1976) (remarks of Rep. Conyers).

ingly, Congress concluded that "governmental units should lead the way in providing equal opportunity." S. Rep. No. 92-415, *supra*, at 434; see also 118 Cong. Rec. 1816 (1972). Thus, although Congress did not *require* state agencies unilaterally to adopt race-conscious measures to remedy the effects of their own past discrimination, the legislative background of the 1972 amendments to Title VII [12] reinforces the conclusion that a state has a compelling interest in doing so.

Furthermore, a state or local agency ordinarily is the appropriate authority to remedy its own discrimination, as distinguished from that of society. Compare *Fullilove* v. *Klutznick*, *supra*, slip op. 3 (Powell, J.); *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 309-310 (Powell, J.).[13] The agency is in the best position and has the expertise to identify and analyze its previous practices and to determine if they were the result of discrimination, subtle or overt. Unlike a court, which is restricted to evidence adduced at a formal trial, the agency has access to all relevant information, including subjective motivations of its officials. Such initiatives are also consistent with the policy reflected in Title VII of de-

---

[12] Congress' legislative findings regarding the effects of and need to remedy racial discrimination in state and local government, expressed in conjunction with the exercise of its power under Section 5 of the Fourteenth Amendment to enforce the equal protection guarantee of that Amendment, is due great weight. Cf. *Fullilove* v. *Klutznick*, *supra*, slip op. 24-27, 30-32 (Burger, C.J.); *id.* at 4-7, 13-15 (Powell, J.); *id.* at 4-5 (Marshall, J.); *City of Rome* v. *United States*, No. 78-1840 (Apr. 22, 1980), slip op. 15-24; *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 301-302 & nn.40, 41, 307-310 (Powell, J.); *id.* at 367-369, 373 (Brennan, White, Marshall & Blackmun, JJ.); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 175-178 (1977) (Brennan, J.); *Katzenbach* v. *Morgan*, 384 U.S. 641, 652-656 (1966).

[13] In the instant case, for example, the Department was explicitly instructed by the Governor to prepare an affirmative action plan, subject to continuing oversight by the State Personnel Board (see *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 308 (Powell, J.)), and the California legislature approved affirmative action efforts by the state agencies. See generally Resp. Br. 37-41.

ferring to the states and localities in remedying employment discrimination (*Mohasco Corp.* v. *Silver*, No. 79-616 (June 23, 1980), slip op. 12-13)—a policy that applies with equal force where it is the state or locality that is alleged to have discriminated. See H.R. Rep. No. 92-238, *supra*, at 19.

For these purposes, a state agency is not confined merely to seeking to identify individual victims of past discriminatory decisions and, if it finds them, affording relief on a case-by-case basis. As Congress so plainly recognized when it extended Title VII to state and local governments (see pages 12-19, *supra*), the effects of employment discrimination in this setting extend well beyond the loss of employment opportunities by particular individuals. Such discrimination deprives the agency of the perspective of minority persons regarding the impact of its programs on minorities; it fosters distrust on the part of minorities of governmental functions carried out by personnel who are not representative of the community at large, thereby perhaps deterring minorities from full participation in government programs; and it sets a highly visible example of discrimination, or acquiescence in the results of past discrimination. In order to remedy these broader effects of discrimination, the agency may appropriately take measures designed to bring minority representation in its work force to the same percentage that obtains in the relevant labor market, and thereby to place the agency in the position it presumably would have been in had there been no discrimination. See *Hazelwood School District* v. *United States*, 433 U.S. 299, 307 (1977), quoting *Teamsters* v. *United States*, 431 U.S. 324, 340 n.20 (1977).[14]

---

[14] Adoption of such voluntary plans also comports with recommendations (contained in a report of the United States Commission on Civil Rights) on which Congress relied in extending Title VII to state and local governments. *For All the People—By All the People—A Report on Equal Employment Opportunity in State and Local Government Employment* (1969). See H.R. Rep. No. 92-238, *supra*, at 17-18; S. Rep. No. 92-415, *supra*, at 121-130; 118 Cong. Rec. 1816 (1972).

Although, as we have shown, Congress made legislative findings regarding the effects of racial discrimination in government employment, it of course did more than merely make findings. It extended to state and local governments the provisions of Title VII of the Civil Rights Act of 1964.[15] Title VII is to serve "as a spur or catalyst to cause employers to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975); *Steelworkers* v. *Weber*, *supra*, 443 U.S. at 204. As we explained in our brief in *Steelworkers* v. *Weber*, *supra* (at 35-53), if this

---

[15] The overriding purpose of Title VII is to "break down old patterns of racial segregation and hierarchy" and "'to open employment opportunities for Negroes in occupations which have been traditionally closed to them'" (*Steelworkers* v. *Weber*, *supra*, 443 U.S. at 208, quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)). As this Court held in *Weber*, a voluntary affirmative action program adopted by an employer to give limited preference to qualified minorities to remedy traditional patterns of racial hierarchy and a manifest imbalance in its employment of minorities is permissible under Title VII. In view of the unique public responsibilities of a governmental entity and the legislative history of the 1972 amendments to Title VII (see pages 17-19, *supra*; *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 353-354 n.28 (Brennan, White, Marshall & Blackmun, JJ.)), it would be "ironic indeed" if the 1972 amendments to Title VII were read as a legislative *prohibition* against adoption by state and localities of race-conscious measures to undo traditional patterns of racial segregation and hierarchy. *Steelworkers* v. *Weber*, *supra*, 443 U.S. at 204. The holding in *Weber* therefore applies with particular force to state and local governments. Moreover, as this Court has recognized, Congress "expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 335 n.14; accord *Chandler* v. *Roudebush*, 425 U.S. 840 (1976). Therefore, if states are subject to greater restriction than private employers in the adoption of affirmative action plans, that restriction derives from the Fourteenth Amendment. For the reasons stated in the text, we believe the Fourteenth Amendment permits a state agency to take reasonable race-conscious measures to remedy its own prior discrimination.

good faith self-examination and self-evaluation create a sound basis on which it reasonably could be concluded that the employer has violated Title VII, he may voluntarily undertake remedial measures even in the absence of an independent finding of discrimination.[16] Such corrective action by the employer is consistent with the statutory scheme, under which "[c]ooperation and voluntary compliance were selected as the preferred means for achieving [the] goal" of equal employment opportunity. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 44. Nothing in Title VII suggests that this policy of encouraging voluntary compliance applies with less force to state and local governments.[17] Accordingly, we submit that a state agency should not be held to *violate* the Fourteenth Amendment if it reasonably and in good faith takes race-conscious measures to remedy the effects of what could fairly be found to be a violation of a statutory provision (Title VII) enacted to *enforce* the Fourteenth Amendment. *United Jewish Organizations* v. *Carey*, *supra*. Because properly tailored race-conscious hiring or promotion are appropriate means of requiring employers to remedy their discrimina-

---

[16] To require a state agency to go further before adopting race-conscious remedial measures, by conclusively proving its own prior discrimination in an independent forum or laying bare all the evidence of that discrimination, would be "self-defeating." *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 364 (Brennan, White, Marshall, & Blackmun, JJ.). As Mr. Justice Blackmun observed in his concurring opinion in *Weber*, if the employer were required to present concrete, nonstatistical evidence to establish specific instances of discrimination, he would pave the way for successful suits by the victims. 443 U.S. at 211. This could lead employers to eschew the voluntary measures Congress intended employers to take to come into compliance with Title VII. *Id.* at 210. In this case, for example, the Department did not offer much of its evidence of specific discrimination until after trial, in its motion to augment the record.

[17] When Congress extended Title VII to employees of state and local government in 1972, it endorsed the view that preferential remedial action may be necessary to redress past discrimination by defeating amendments designed to limit such remedies. *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 353-354 n.28 (Brennan, White, Marshall, & Blackmun, JJ.).

tory conduct (see, *e.g.*, *Fullilove* v. *Klutznick*, *supra*, slip op. 19 (Powell, J.)), a state agency may undertake such measures voluntarily.[18] Indeed, an *obligation* to adopt affirmative measures to overcome the effects of its prior discrimination is made explicit in LEAA's regulations implementing the nondiscrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, which apply here. 28 C.F.R. 42.203(i).[19] See *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 341-345 (Brennan, White, Marshall & Blackmun, JJ.). This regulation is

---

[18] Petitioners maintain that affirmative action is not permissible where the agency concerned admitted only that its past actions had a discriminatory *impact* but did not admit that its practices were purposefully discriminatory. However, statistical evidence may establish a prima facie showing of purposeful discrimination in violation of Title VII and the Fourteenth Amendment (see note 21, *infra*). Thus, even if such a showing is a prerequisite to voluntary affirmative action by a public employer, this requirement may be met without an express admission.

In any event, petitioners' assumption that the Constitution prohibits affirmative measures designed to correct nonpurposeful discrimination is without merit. See *Fullilove* v. *Klutznick*, *supra*, slip. op. 27-28 (Burger, C.J.). In enforcing the Fourteenth Amendment, Congress may declare illegal actions which are not purposefully discriminatory in order to protect the rights guaranteed by the Fourteenth Amendment. See *ibid.*; *Katzenbach* v. *Morgan*, 384 U.S. 641, 653 (1966). Public entities may then act to ensure that they comply with Congress' enactments even when they have not purposefully discriminated. See *United Jewish Organizations* v. *Carey*, *supra*, 430 U.S. at 149-161; *Fullilove* v. *Klutznick*, *supra*, slip op. 27-28 (Burger, C.J.).

This Court's decision in *Dothard* v. *Rawlinson*, *supra*, forecloses petitioners' suggestion (Pet. Br. 34) that Title VII prohibits only purposeful discrimination by state and local governments. Under the cases, a discriminatory impact of a public employer's practices violates Title VII unless the employer rebuts the prima facie case by establishing a business necessity for the practices. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 579-580 (1978); *Hazelwood School District* v. *United States*, 433 U.S. 299, 311 n.17 (1977).

[19] Guidelines implementing Title VII also require such self-analysis and recommend affirmative measures to ensure compliance with Title VII. 44 Fed. Reg. 4422 (1979); 29 C.F.R. 1608.1. See also Policy Statement on Affirmative Action for State and Local Government Agencies. 41 Fed. Reg. 38814 (1976); 28 C.F.R. 50.14.

fully consistent with the intent of Congress. 122 Cong. Rec. 33880 (1976).[20]

The courts below did not consider whether the particular affirmative action plan at issue here was adopted for the purpose of remedying prior discrimination or whether there was a sound basis for believing that some remedial measures were necessary. These issues remain open for consideration on remand to the Superior Court. We therefore do not urge this Court to make the legal and factual findings necessary to sustain the Program, in whole or in part, on this ground. We note, however, that the record developed thus far indicates that the Program was instituted, at least in substantial part, to remedy prior discrimination and that there was a sound basis for believing that some remedial measures were necessary.[21] The fact

---

[20] Senator Hruska, in commenting on the 1976 amendments to Section 518(b) of the Act, which bars LEAA from requiring the adopting of a percentage ratio or quota system, explained (122 Cong. Rec. 33880 (1976) (emphasis added):

> LEAA does have an affirmative obligation under this law to seek to eliminate discriminatory practices, *voluntarily*, if possible, prior to resorting to fund termination. *LEAA can request that a recipient eliminate the effect of past discrimination by requiring the recipient to commit itself to goals and timetables.* The formulation of goals is not a quota prohibited by section 518(b) of the act. A goal is a numerical objective fixed realistically in terms of the number of vacancies expected and the number of qualified applicants available. Factors such as a lower attrition rate than expected, bona fide fiscal restraints, or a lack of qualified applicants would be acceptable reasons for not meeting a goal that has been established and no sanctions would accrue under the program.

See *United States* v. *City of Los Angeles*, 595 F.2d 1386 (9th Cir. 1979).

[21] The Affirmative Action Program indicates that the Department reviewed its own employment practices in order to identify their discriminatory aspects. See *Fullilove* v. *Klutznick*, *supra*, slip op. 3 (Powell, J.). The Department undertook an extensive statistical analysis of the composition of its own work force, finding underrepresentation of women and minorities in a number of areas (Exh. G at 21-38). As this Court has frequently noted, a disparate impact itself is often strong evidence of discrimination. See, *e.g.*, *Teamsters* v. *United States*, 431 U.S. 324, 339 & n.20

that the Department may also have considered its operational need for prison security and inmate rehabilitation (see *infra*, page 26) does not undercut the validity of the Program's remedial purpose.

Moreover, although the precise operation of the Program is not clear from the record and is open for examination on remand, certain of its features as they affect promotions, indicated on the record developed thus far, suggest that it is appropriately tailored to accomplish a remedial purpose.[22] *Fullilove* v. *Klutznick, supra*, slip op. 28, 33 (Burger, C.J.); *Califano* v. *Webster, supra*, 430 U.S. at 317. The Department's Program stigmatizes no group or individual.

(1977); *Village of Arlington Heights* v. *Metropolitan Housing Corp*, 429 U.S. 252, 266 (1977). The Department's commitment (Exh. R at 12-13, 24) to review job qualifications for their job-relatedness indicates, moreover, that it could not then justify any disparate impact on the basis of business necessity. The Program appears in other ways implicitly to acknowledge prior discrimination by the Department, noting the need (1) to develop staff sensitivity and commitment to equal employment opportunity; (2) to correct underepresentation of women and minorities; and (3) to develop upward mobility programs for women and minorities. Exh. R at 12-13, 24.

Moreover, as regards preferences given in *promotions*—the only issue in this case (see note 5, *supra*)—the Program specifically noted a need to correct underrepresentation of women and minorities at supervisory and management levels. The statistical analysis showed that as of September 1973, minorities held only 16.3% of the administrative positions and 10.9% of the higher ranking security positions in the Department, as compared with 23.7% minorities in the California labor market and 26% in the entry-level security positions (Exh. G. at 26, 33-34). Similarly, women held only 8% of the Department's non-clerical positions (*id.* at 22), although they comprised 38% of the California labor force. While 5.9% of the entry level correctional officers were female, women held only 3.6% of the higher level security positions (*id.* at 36). The record shows that women were not allowed to hold security positions in the eleven all-male prisons until 1972 (R.T. 73, 211, 442). Other testimony at trial also reflected a purpose to remedy prior discrimination (*e.g.*, R.T. 338, 344, 706).

[22] While this plan does not involve set-asides, this Court has held that remedial set-aside are lawful under some circumstances. See *Steelworkers* v. *Weber, supra; Fullilove* v. *Klutznick, supra.*

Minority or female status is only a "plus" or a factor to be taken into account, and only in those instances where statistics indicate that minorities and women are underrepresented. Once this underutilization is cured in a particular category, all individuals presumably would be considered on an equal basis.

The Program also has a limited impact on nonminorities and men. No white or male is required to relinquish a previously obtained promotion, and no white or male is foreclosed from consideration for any position. Rather, the Department's plan is very similar to the Harvard plan approved by this Court in *Bakke*. 438 U.S. at 316-319 (Powell, J.); *id.* at 326 n.1 (Brennan, White, Marshall & Blackmun, JJ.). It is (*id.* at 317-318 (Powell, J.)):

> flexible enough to consider all * * * qualifications of each applicant [including whether promoting the applicant would further remedial goals,] and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to [minority or female status] may vary from [position to position] depending upon the [level of underrepresentation] and the [ability of the] applicants for the [position].

B. The Court Should Not Reach The Operational Needs Justification

Respondents also have sought to defend their employment practices under the Affirmative Action Program as they affect minorities on the ground that they further the state's compelling interests in promoting prison security and fostering inmate rehabilitation (Resp. Br. 43-50).[23] In our

---

[23] Respondents contend (Resp. Br. 43-45), for example, that increasing the minority composition of the correctional workforce at all levels is essential to ameliorate racial tension and the threat of racial violence. This is so, they maintain (Resp. Br. 46-48), because there is in general greater cultural identification between inmates and officers of the same race, which can lead to better communications and reduced tension. Minority guards also can serve as a vehicle for the airing of grievances to the prison administration. Respondents also contend (Resp. Br. 48-50) that integration of minority members throughout the correctional work

view, this asserted justification for respondents' policies largely overlaps with, and therefore cannot be considered separately from, respondents' argument that their policies are appropriate remedial measures for prior discrimination by the Department. If there has been a history of racial discrimination in the Department's past employment practices, then the racial tension, barriers to communication, and lack of sensitivity to minority problems that respondents describe may have been attributable in large part to that discrimination. As explained above, Congress recognized that employment discrimination by the government (and particularly by law enforcement agencies) is particularly deleterious because it creates hostility and distrust on the part of the minority community and fosters ignorance among responsible government officials regarding minority problems. See pages 18-19, *supra*. It is precisely for this reason that it is particularly appropriate for a state agency to take affirmative action to increase minority representation to the level that would have obtained in the absence of discrimination. Thus, an affirmative action plan incorporating race-conscious measures to remedy prior discrimination would be calculated to address the very effects of racial discrimination that respondents identify. And, indeed, many of the arguments respondents advance (see note 23, *supra*) only go to the need for the *presence* of minority staff, not any particular percentage of minorities (see note 25, *infra*).

The use of race-conscious selection techniques is far more troubling, however, when supported solely by an assertion that government could perform more effectively

---

force fosters inmate rehabilitation, because minority officers provide role models for minority inmates and their presence serves to demonstrate that those in authority understand their concerns and will treat them fairly. Amicus City of Detroit also contends (Br. 26-50) that greater minority representation is necessary because racial discrimination practiced against minority inmates by a virtually all white staff had been a major cause of serious racial violence in the California prison system (Br. 26-30), and that minority supervisors can help shape institutional policies to avoid racial difficulties (Br. 36).

with more employees of a particular race and that the people with whom the agency comes into contact would prefer to communicate with persons of their own race. Race-conscious selection on this ground significantly involves the government in the reinforcement of racial stereotypes and comes perilously close to embracing—however limited and compelling the circumstances—the perceptions and practices that it was the very purpose of the Civil War Amendments and Title VII to eliminate.[24]

We do not urge the Court to conclude that race-conscious action could never be defended against a Fourteenth Amendment challenge on the basis of operational needs. This Court has indicated, for example, that prisoners might be segregated on the basis of race on a temporary basis in extreme circumstances to preserve or restore prison security and discipline in a race-charged atmosphere. *Cruz* v. *Beto*, 405 U.S. 319, 321 (1972); *Lee* v. *Washington*, 390 U.S. 333, 334 (1968). The Superior Court's order recognized that there may be a similar need to assign duties to employees on the basis of their race in particular circumstances (Pet. App. F-6 to F-7). This latitude may well satisfy the Department's desire to have minority guards available to communicate with and air grievances of minority inmates. But this day-to-day flexibility is far different from taking race-conscious measures on a class-wide basis to achieve a particular level of employment for one race because of its asserted desirability in the normal course or for an indefinite period.

---

[24] This Court's decision in *Weber* only recognized the authority of an employer under Title VII to adopt temporary race-conscious measures to further the purposes of Title VII of breaking down racial segregation and hierarchy and opening up job opportunities. Thus, whatever may be the latitude of a state under the Fourteenth Amendment, standing alone, we seriously doubt that race-conscious measures adopted solely to further operational needs would be permissible under Title VII, at least in the absence of the type of extreme circumstances suggested in *Lee* v. *Washington*, 390 U.S. 333, 334 (1968), and *Cruz* v. *Beto*, 405 U.S. 319 (1972). There is no occasion to resolve that question here, however, because the state courts were without jurisdiction over the Title VII claims.

Cf. *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Korematsu* v. *United States*, 323 U.S. 214 (1944). Only the most compelling of justifications, which we do not believe have been shown on the present record, could support such a practice. Accordingly, in a case such as this, the Court should first consider what measures are appropriate to remedy prior discrimination, for which the temporary use of class-based, race conscious measures is appropriate. Only then, and on a far more particularized and exacting basis than has thus far been developed in the courts below, should the Court consider whether additional measures, not supportable on remedial grounds, might be warranted.[25] The Superior Court can follow this

---

[25] Although the validity of the particular goals adopted for minority and female employment is not before the Court (see note 5, *supra*), the Department's establishing of a goal for minority representation in the work force at 70% of the percentage in the inmate population illustrates the difficulty with the operational needs concept. The Department appears to have adopted that goal principally, if not solely, on the belief that LEAA guidelines required that level of minority representation; the Program, as adopted in 1974 and revised in 1975, contains no explanation why that figure should apply to support staff, who have no contact with inmates; why a particular level in excess of the percentage of minorities in the labor market is vital; or why 70% of the representation is significantly preferable to some other figure (Exh. G at 11, 21, 40).

Moreover, the LEAA guidelines did not require such a level of minority employment. They provided only that LEAA would give priority in conducting compliance reviews to recipient agencies in which the disparity between the percentage of minority employees and minority inmates was greater than this 70% figure. 28 C.F.R. 42.306(b) and (c) (1976). Furthermore, LEAA deleted the 70% guideline when it revised its regulations in 1977. LEAA observed that a representative of petitioner CCOA had observed that the reference to inmate population "shifted the principle of equal employment opportunity to 'a notion that race or sex is job-related to the work the employee is performing' " and "sugests that a particu-large percentage of minorities or women in the correctional officer work is somehow required to do an adequate job in guarding and/or supervising the inmates." *Ibid.* LEAA stated that "[*n*]*o empirical evidence supporting this notion was offered to LEAA.*" *Ibid.*; emphasis added. Acocrdingly, LEAA chose to look to the relevant

course on remand, first considering the remedial justification for the Program.

---

labor market in testing for discrimination. *Ibid.* This conforms to Title VII principles (see *Hazelwood School District* v. *United States*, 433 U.S. 299, 308 (1977)), which Congress made applicable to the nondiscrimination provisions administered by LEAA when it amended the Omnibus Crime Control and Safe Streets Act in 1976. See H.R. Conf. Rep. No. 94-1723, 94th Cong., 2d Sess. 32 (1976).

Thus, it is the considered judgment of LEAA that an institution's operational needs do not in general require a percentage of minorities in the work force mirroring that in the inmate population. Respondents nonetheless chose to carry forward the 70% goal in the Affirmative Action Program adopted in 1979, a copy of which has been lodged with the Clerk of this Court. Of course, the selection of the 70% goal for employment of minorities in the *future* would not, as petitioners seem to suggest (Pet. Br. 32), undercut the validity of the Department's apparent conclusion that it discriminated against minorities in the *past*.

CONCLUSION

The writ of certiorari should be dismissed. If the writ is not dismissed, the judgment of the Court of Appeal, reversing the Superior Court's injunction prohibiting consideration of race or sex under any circumstances, should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

BRIAN K. LANDSBERG
JESSICA DUNSAY SILVER
VINCENT F. O'ROURKE, JR.
ANDRE M. DAVIS
Attorneys

LEROY D. CLARK
General Counsel

LUTZ ALEXANDER PRAGER
PAUL E. MIRENGOFF
Attorneys
Equal Employment Opportunity Commission

NOVEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 332795 138